Case No. S168066

IN THE

Supreme Court of the State of California

Robin Tyler, an individual, and Diane Olson, an individual,

Petitioners,

v.

The State of California, a political body acting in its own right and/or through Edmund G. Brown, in his capacity as Attorney General, and/or Debra Bowen, in her capacity as Secretary of State,

Respondents,

Proposition 8 Official Proponents Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson, and ProtectMarriage.com – Yes on 8, a Project of California Renewal,

Proposed Intervenor Real Parties in Interest.

PRELIMINARY OPPOSITION OF PROPOSED INTERVENOR REAL PARTIES IN INTEREST TO AMENDED PETITION FOR WRIT OF MANDAMUS, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF AND REQUEST FOR IMMEDIATE STAY

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(Motion to Intervene filed concurrently)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Proposed Intervenor Real Parties in Interest hereby certify that they are not aware of any person or entity that must be listed in accordance with California Rule of Court 8.208(d).

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PRELIMINARY STATEMENT

Proposed Intervenor Real Parties in Interest are the five Official Proponents of Proposition 8 (Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson) and the official campaign committee in favor of Proposition 8 (ProtectMarriage.com - Yes on 8, a Project of California Renewal, FPPC ID #1302592). Pursuant to Rule 8.490(g) of the California Rules of Court, Proposed Intervenors submit the following preliminary opposition to the Amended Petition. A Motion to Intervene is also filed herewith.

This preliminary opposition should not be deemed a full statement of arguments supporting Proposition 8. Rather, it contains a summary of some of the arguments Proposed Intervenors would make if the Court agrees to consider the merits of the issues raised by the Amended Petition and if the Court grants their Motion to Intervene. It also addresses why an interim stay of Proposition 8 should not be granted. Proposed Intervenors reserve the right to make additional arguments in full briefing should the Court exercise original jurisdiction in this matter.

INTRODUCTION AND SUMMARY OF PRELIMINARY OPPOSITION

Proposed Intervenors agree with Petitioners that the validity of Proposition 8 is of great public importance and should be resolved as soon as possible. The issues are purely legal and, given their constitutional and social significance, should ultimately be decided by this Court. The interests of justice and of the political system itself would not be served by the uncertainty and delay that litigation in the lower courts would cause. Proposed Intervenors urge this Court to consider on the merits the issues raised by the Petitioners and set a schedule for expeditious briefing and oral argument.

Although agreeing this Court should decide the issues raised by Petitioners, Proposed Intervenors disagree with Petitioners on the merits of their challenge. Proposition 8 is a proper initiative amendment and not a revision to the Constitution requiring extraordinary procedures. The people of California have reserved the sovereign power to amend their Constitution through the initiative process. That power is broad and deep and by nature populist. It has often been used to make significant changes in State government and to override judicial interpretations of the Constitution with which the people disagree—including interpretations involving basic constitutional rights. By reserving this power, the people of California have placed themselves at the center of an ongoing and highly democratic conversation about the meaning of the Constitution.

This Court has never suggested that the initiative power may not be used to restrict the reach of constitutional rights, whether long-established or newly recognized. Constitutional rights are often phrased broadly, allowing courts to interpret them in ways the people may deem unwise. The meaning and scope of particular constitutional rights is properly the subject of the people's power to amend the Constitution by initiative; the people have retained and play an active role in such matters. This use of the initiative power makes perfect sense when constitutional rights significantly affect basic social policy, such as the definition of fundamental social institutions like marriage. The people have reserved the power to use initiative amendments to establish public policy in critical areas, which may include the expansion or contraction of constitutional rights. Nothing in this Court's decisions regarding initiative amendments suggests otherwise.

Petitioners' arguments that Proposition 8 constitutes a revision to the Constitution are abstract and find no support in California case law or in the judiciary's long tradition of respectful deference to initiative amendments.

Other courts addressing similar revision/amendment arguments under closely analogous constitutional provisions have rejected them. This Court should do likewise here. Proposition 8 is simple, narrow, and targeted to a single issue. It restores the definition of marriage to what it was and always had been prior to May 15, 2008—nothing more. It does not diminish the right of same-sex couples under existing California law to obtain through registered domestic partnerships all the same substantive rights, privileges, and benefits as married spouses enjoy. Petitioners greatly exaggerate when they suggest that Proposition 8 would result in such a fundamental abrogation of equal protection rights as to alter the very nature and structure of the California Constitution.

This Court's 4-3 decision in *In re Marriage Cases* (2008) 43 Cal.4th 757 (hereafter "*Marriage Cases*") broke new constitutional ground and, with due respect, was by no means self-evident. Three learned justices of this Court and two justices of the Court of Appeal—all devoted to equality before the law—reached the opposite conclusion. Petitioners challenge the people's decision to adopt the interpretation of those justices, arguing that it makes far-reaching changes to the nature of our basic governmental plan by severely compromising the core constitutional principle of equal protection of the laws. That argument, however, is strained and untenable. The effect of Proposition 8 is limited to reinstating the *status quo* that existed before the *Marriage Cases* decision took effect on June 16, 2008. Petitioners' arguments would most likely have been summarily rejected if Proposition 8 had been enacted before the *Marriage Cases* decision, and they should be rejected now for the same reasons. The revision/amendment analysis does not turn on the fortuity of timing.

Nor would Proposition 8 destroy the courts' quintessential power and role of protecting gay and lesbian rights through appropriately robust interpretations of the Constitution's privacy, due process, and equal

protection provisions. Proposition 8 does nothing to alter the power of the judiciary to define the nature and scope of constitutional rights in numerous other contexts affecting homosexual individuals. It simply establishes the State's substantive policy regarding the term "marriage." To conclude Proposition 8 is such a profound change that it requires a constitutional revision would itself constitute a dramatic departure from this Court's revision/amendment jurisprudence, one that would directly and substantially undermine the people's reserved initiative power. Whatever one's view of the wisdom of Proposition 8, the people of California have spoken and their will should be respected.

Because Petitioners are unlikely to prevail on the merits, this Court should also reject Petitioners' request for interim relief. Moreover, interim relief threatens to cause serious confusion. Under Article XVIII, Section 4 of the California Constitution, Proposition 8 became effective on November 5, 2008, the day after the election. If Proposition 8 is ultimately upheld then same-sex marriages performed after its enactment—including those solemnized during an interim stay—would have no effect. The better course is for this Court to exercise its original jurisdiction in this matter, deny Petitioners' request for a temporary stay, and set an expedited schedule for full briefing and argument so that a decision denying the petitions on the merits can be rendered as soon as possible.

FACTS

1. Proposed Intervenors are the Official Proponents of Proposition 8 — Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson (hereafter "Official Proponents")— and ProtectMarriage.com - Yes on 8, a Project of California Renewal, FPPC ID #1302592, the official campaign committee in favor of Proposition 8 (collectively referred to as "Proposed Intervenors").

2. On June 20, 2008, Equality California and others filed a Petition for Extraordinary Relief, Including Writ of Mandate and Request for Stay ("pre-election Petition"), naming the Secretary of State as Respondent and these same Official Proponents as Real Parties in Interest. (*See Bennett v. Bowen*, S164520, Petition for Extraordinary Relief, Including Writ of Mandate and Request for Stay, filed on June 20, 2008.)

3. The pre-election Petition argued that the Official Proponents could not propose Proposition 8 by initiative because it would constitute an unlawful revision of the Constitution rather than a proper initiative amendment.

4. On June 30, 2008, the Official Proponents filed their Preliminary Opposition to the pre-election Petition.

5. On July 16, 2008, this Court summarily denied the pre-election Petition, which allowed Proposition 8 to remain on the ballot.

6. On November 4, 2008, a majority of the electorate voted to enact Proposition 8. Although some ballots are still being counted, there is little doubt Proposition 8 will receive a majority of the votes.

7. Proposition 8 adds the following 14 words to the State Constitution: "*Only marriage between a man and a woman is valid or recognized in California.*"

8. On November 5, 2008, Petitioners Robin Tyler and Diane Olson filed their Petition for Writ of Mandamus, Prohibition, or Other Extraordinary Relief and Request for an Immediate Stay with accompanying memorandum of points and authorities. On November 6, 2008, Petitioners filed an Amended Petition adding Cheri Schroeder and Coty Rafaely as parties seeking the same relief. As in the pre-election Petition, the instant Amended Petition seeks to invalidate Proposition 8 on the ground that Official Proponents should have used the revision process to enact their amendment rather than the initiative process.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS JURISDICTION IN THIS MATTER AND SET AN EXPEDITED SCHEDULE FOR FULL BRIEFING ON THE MERITS AND ORAL ARGUMENT.

The Amended Petition invokes the original jurisdiction of this Court. Although this Court "customarily decline[s] to exercise such jurisdiction, preferring initial disposition by the lower courts," (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500) Proposed Intervenors agree that "the present case involves issues of sufficient public importance to justify departing from [this Court's] usual course." (*Ibid.*)

Indeed, the issues are of enormous public importance. The people of California are entitled to a prompt resolution of whether Proposition 8 properly amended their Constitution. Proposition 8 was the subject of a vigorous and expensive campaign that generated an intense debate and very strong feelings on both sides. The people have a right to know as quickly as possible the status and definition of marriage under the California Constitution. It is "uniformly agreed" that these "issues are of great public importance and should be resolved promptly." (*Legislature v. Eu*, *supra*, 54 Cal.3d at 500.)

Moreover, the legality of a successful initiative amending the Constitution is sufficiently momentous that it must ultimately be resolved by this Court. Prolonged warm-up litigation in the lower courts would be of little or no value. The issues are purely legal, requiring no factual development in the Superior Court. If this Court exercises its jurisdiction in this matter, briefing by the parties and likely *amici* will be comprehensive and address all relevant issues. Lower court review is

unlikely to shed additional light on the matter, and in any event cannot compensate for the adverse effects of delay.

Lastly, same-sex couples are entitled to know as soon as possible whether the Constitution has been amended to preclude marriage between persons of the same sex. While Proposed Intervenors support the validity of Proposition 8, it is in no one's interest to keep same-sex couples in legal limbo for an extended period of time while litigation is pending in the lower courts. Basic fairness dictates that this Court quickly resolve the issues raised in the Amended Petition.

For these reasons, and without conceding the validity of Petitioners' substantive arguments, Proposed Intervenors urge this Court to exercise its original jurisdiction and set an expedited schedule for full briefing on the merits and oral argument so the issues presented can be addressed "at the earliest practicable opportunity." (*People v. Frierson* (1979) 25 Cal.3d 142, 172.)

II. PROPOSITION 8 IS A VALID INITIATIVE AMENDMENT AND NOT A REVISION OF THE CONSTITUTION.

If this Court exercises jurisdiction and sets this matter for a hearing on the merits, Proposed Intervenors will demonstrate that Proposition 8 is a proper constitutional amendment and that Petitioners' novel arguments cannot prevail. Adopting such arguments in order to declare Proposition 8 invalid would be unprecedented and would constitute a serious encroachment on the people's sovereign right to amend the Constitution and set basic public policy through the initiative process. Some of the arguments Proposed Intervenors intend to develop in full briefing are the following:

1. **The people's right to amend the Constitution through the initiative process is a retained sovereign power.** "All political power is inherent in the people." (Cal. Const., art. II, § 1.) The people have

expressly reserved to themselves the authority to amend the Constitution by initiative. (Cal. Const., art. II, § 8, subd. (a).) When using the initiative process to amend the Constitution, the people exercise their sovereign power of self-government. The three branches of government must accord profound respect and great deference to that authority, which is the very basis of the government's democratic legitimacy.

2. **The initiative power is broad and liberally construed.** This Court has repeatedly emphasized that the people's "power of initiative must be liberally construed . . . to promote the democratic process." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 219 ("*Amador Valley*").) "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 332.)

3. **Petitioners bear a heavy burden in seeking to overturn Proposition 8.** The strong presumption is that Proposition 8 is valid: "[A]ll presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*Legislature v. Eu*, *supra*, 54 Cal.3d at 501.) Novel arguments and abstract theories should be viewed with great skepticism to the extent they purport to limit the initiative power.

4. **Constitutional Revisions are characterized by substantial changes in the structure of California's system of government.** Revisions can be either quantitative or qualitative. (*Amador Valley*, *supra*, 22 Cal.3d at 222; *see also Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349.) A quantitative revision is "an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well

constitute a revision thereof." (*Amador Valley*, *supra*, 22 Cal.3d at 222.) Petitioners do not contend that the concise fourteen-word Proposition 8 amounts to a quantitative revision. "[A] qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental *structure* or the foundational *powers* of its branches." (*Legislature v. Eu*, *supra*, 54 Cal.3d at 509 [emphasis added].) Not only must a qualitative revision alter governmental power or structure, it must effect "*far reaching changes* in the nature of [California's] basic governmental plan." (*Amador Valley*, *supra*, 22 Cal.3d at 223 [emphasis added].)

5. **Initiative amendments are properly used to establish public policy and define fundamental rights.** The people are not limited in the subject matters they may address through the initiative amendment process. The people have the power to amend the Constitution by initiative to establish California's fundamental public policy in every area of the law. That power includes the authority to define – and thus expand or contract – the fundamental constitutional rights of particular classes of people. (*See, e.g.*, *People v. Frierson*, *supra*, 25 Cal.3d 142 [fundamental rights of vulnerable class of criminal defendants can be amended by a constitutional initiative].) Petitioners concede that Californians can use their amendment power to define the substantive scope of an important right under the Constitution.

6. **Initiative amendments are properly used to overturn judicial decisions with which the people disagree, including in areas of fundamental rights.** The people have not limited their initiative amendment power to matters that affect only the executive or legislative branches. The power to amend the Constitution by initiative includes the power to overturn judicial decisions that establish or reject fundamental constitutional rights. (*See, e.g.*, *People v. Frierson*, *supra*, 25 Cal.3d 142.)

7. **Equal protection rights are not exempt from the initiative amendment power.** The fact that equal protection rights are counter-majoritarian by nature does not alter the revision/amendment analysis. *All* constitutional rights are inherently counter-majoritarian. Nothing in this Court's decisions suggests equal protection rights enjoy a special exemption from the people's power to define constitutional rights through the initiative process.

8. **Proposition 8 is a proper initiative amendment under this Court's precedent.** Proposition 8 is extremely limited and does nothing more than restore the marriage laws to how they existed prior to June 16, 2008 (when this Court's decision in the *Marriage Cases* became effective). It does not alter the basic plan of California government nor this Court's role in interpreting the Constitution—its subject is exclusively the definition of marriage. Proposition 8 leaves undisturbed all other constitutional rights affecting gays and lesbians. To the extent it limits the rights of same-sex couples, it does so only as a necessary incident to the people's sovereign decision to retain the traditional definition of marriage.

9. **The courts of other states have uniformly rejected revision/amendment claims brought against constitutional amendments that limit marriage to a man and a woman.** Courts in our sister states have rejected closely analogous challenges to similar initiative amendments. Much of the reasoning of those courts is applicable and persuasive here. (*Lowe v. Keisling* (Or. Ct. App. 1994) 882 P.2d 91; *Martinez v. Kulongoski* (Or. Ct. App. 2008) 185 P.3d 498; *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979 [analyzing California revision/amendment law]; *Albano v. Att'y Gen.* (Mass. 2002) 769 N.E.2d 1242 [evaluating initiative efforts to overturn Massachusetts' same-sex marriage decision and reasoning that an initiative amendment is not invalid "merely because it

changes the law enforced by the courts. To adopt such an interpretation would be to render the popular initiative virtually useless."].)

10. **Petitioners' arguments would dramatically restrict the people's reserved initiative power.** Petitioners advance a complex and unprecedented theory for why the people's admittedly broad initiative power does not include the authority to define marriage. Frankly, the very notion is perplexing. Whatever superficial appeal Petitioners' theories may have as a means of reaching a particular result, they would fundamentally limit the nature of the people's reserved initiative power and should therefore be rejected. Nothing in this Court's prior decisions remotely supports the conclusion that Proposition 8 is clearly and unmistakably a revision.

11. **Petitioners' arguments amount to a substantive challenge to the wisdom and merits of Proposition 8.** The arguments in the Amended Petition are not truly revision/amendment arguments but rather a veiled challenge to the substance of Proposition 8. Proposition 8 forecloses such a challenge under the California Constitution. If Petitioners desire to overturn Proposition 8, their only recourse under state law is to amend the Constitution once again. The people's initiative powers should not be circumscribed to reach a substantive result.

III. THIS COURT SHOULD NOT GRANT AN INTERIM STAY OR PRELIMINARY INJUNCTION.

In asking this Court to stay a newly enacted constitutional amendment, Petitioners seek unprecedented relief that will create significant confusion in the law and society. There is no clear legal authority for an interim stay. Even if Petitioners sought a preliminary injunction, they could not satisfy the requirements for such relief. Indeed, Petitioners fail to provide any legal authority or argument for interim relief.

At any rate, the better course is for the Court to deny interim relief and instead expedite resolution of the issues presented in the Petition.

A. There Is No Clear Legal Authority Authorizing this Court to Stay the Effect of a Constitutional Amendment.

Petitioners have not pointed to any legal authority supporting their request for a stay of a constitutional amendment. Petitioners might argue that Section 923 of the California Code of Civil Procedure supplies such authority, but the express terms of that section limit its application to "the power of a reviewing court or of a judge thereof to stay proceedings *during the pendency of an appeal* . . . [in order] to preserve the status quo . . . or otherwise in aid of its jurisdiction." (Code Civ. Proc., § 923 [emphasis added].) Section 923 applies only in the appellate context and is technically inapplicable in this original writ action. (*See Estate of Sam Lee* (1945) 26 Cal.2d 295, 296 [function of writ of supersedeas "is to maintain the subject matter of the proceeding until the final determination thereof in order that the appellant may not lose the fruits of a meritorious appeal"].)

Petitioners might also invoke California Rule of Court 8.490(b)(7), which incorporates Rule 8.116(a). Together, these provisions permit a petitioner to request a "temporary stay" in a petition for writ of mandate or "petition for original writ." But there does not appear to be any case where Rule 8.490(b)(7) has been used to block the implementation of a duly-enacted constitutional amendment.

Petitioners might invoke as a basis for the requested stay this Court's inherent power to preserve the status quo when exercising its original jurisdiction. But such an argument would also lack precedent.

In all events, Petitioners do not actually seek to preserve the status quo through a stay. Under the Constitution, Proposition 8 took "effect the day after the election" – at 12:00 a.m. on November 5, 2008 – and is now

the law of California. (Cal. Const., art. XVIII, § 4.) The Amended Petition was filed later that same day. Thus, a stay technically does not grant Petitioners the relief they seek since Proposition 8 is already in effect. A stay is both unprecedented and the wrong remedy.

B. Petitioners Have Not Satisfied Their Burden To Obtain A Preliminary Injunction.

The better label for what Petitioners seek is a preliminary injunction. (*See White v. Davis* (2003) 30 Cal.4th 528, 554 ["[A] *preliminary* injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim.*"] [emphasis in original].) As with the requested stay, there is no support in the case law for preliminarily enjoining enforcement of a constitutional amendment.

But even if this Court has the authority to issue an injunction, Petitioners have not met their burden of demonstrating entitlement to such relief – in fact, they haven't even tried to make such a showing. (*See O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481 [stating that the party seeking injunctive relief has the "burden . . . to show all elements necessary to support issuance of a preliminary injunction"].) The "principal objective of a preliminary injunction 'is to minimize the harm which an *erroneous* interim decision may cause.'" (*White v. Davis*, *supra*, 30 Cal.4th at 561 [emphasis in original] [quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73].) When deciding whether to issue a preliminary injunction, this Court considers two independently necessary factors: (1) the likelihood the moving party will prevail on the merits; and (2) the relative "interim harm" to the parties from the issuance or nonissuance of the preliminary injunction. (*IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at 69-70; *White v. Davis*, *supra*, 30 Cal.4th at 554; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-42.) Petitioners satisfy neither factor.

1. Petitioners Have Not Demonstrated A Likelihood Of Success On The Merits.

As indicated in Section II of this Preliminary Opposition, Petitioners cannot demonstrate a likelihood of success on the merits of their revision/amendment claim. Petitioners' novel theory contradicts this Court's jurisprudence and cannot overcome the strong presumption of validity that initiative amendments enjoy. This should be fatal to any request for interim injunctive relief.

2. The Balance Of Interim Harms Weighs Against Issuing A Preliminary Injunction.

"To obtain a preliminary injunction, a [petitioner] ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis*, *supra*, 30 Cal.4th at 554 [citing *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526].) The balance-of-the-harms analysis is not concerned with the long-term effects of the complained-of conduct; it instead focuses on the irreparable "interim" harm the petitioner will experience during the litigation. (*See IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at 69-70 [stating that balance-of-the-harms factor involves "the interim harm that the [petitioner] is likely to sustain if the injunction were denied"].)

Here, the balance of interim harms weighs against granting Petitioners' request for a preliminary injunction.

a. Petitioners Have Not Demonstrated They Will Suffer Irreparable Injury or Interim Harm Without a Preliminary Injunction.

The possible *interim* harms to the individual Petitioners if injunctive relief is denied are uncertain and difficult to assess. Two of the Petitioners are already married and do not allege any current challenge to their

marriage. The other Petitioners desire to marry in the future but do not state specific plans or timeframes. (Amended Petition p. 1.) If they exist, it is unclear whether marriage plans would be materially frustrated if injunctive relief were denied during the pendency of these proceedings. If, as Proposed Intervenors urge, this Court exercises its jurisdiction and quickly adjudicates this matter (in the next 60 to 90 days), and assuming Petitioners ultimately prevail, there may be little or no material disruption to any marriage plans that may exist. At most, they would have endured a relatively short delay.

Moreover, even with the passage of Proposition 8, Petitioners are still entitled to every legal incident of marriage through the domestic partnership law. (*See In re Marriage Cases*, *supra*, 43 Cal.4th at 801 [California domestic partnership law "affords same-sex couples the opportunity . . . to obtain virtually all of the legal benefits, privileges, responsibilities, and duties" associated with marriage.].) Petitioners can easily choose to use that alternative legal regime to order their affairs while this litigation is pending.

Nor should harm merely be assumed on the ground that Petitioners would not be able to marry the person of their choosing. The weight of such a harm is uncertain because Proposition 8, which is both in effect and strongly presumed valid, has eliminated that right and it is unlikely Petitioners' arguments against it will prevail on the merits.

b. The Public Interest and the People of California Will Suffer Immediate and Substantial Harm if the Court Issues a Preliminary Injunction.

On the other side of the scale is the harm that will occur to the public interest and people of California if a preliminary injunction or stay is granted. (*See IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at 69-70

[court must consider "the harm that the [respondent] is likely to suffer if the preliminary injunction were issued"]; *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 435 [court must consider the "adverse effect on the public interest or interests of third parties the granting of the injunction will cause"] [quoting *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 n.5].)[1]

"[C]ertainty, predictability[,] and stability in the law are the major objectives of the legal system." (*People v. Garcia* (2006) 39 Cal.4th 1070, 1080.) If this Court grants a preliminary injunction, the Respondents (all government officials), Proposed Intervenors, and the general public will be subject to tremendous legal instability. Within the space of a few months, the definition of marriage would have rapidly oscillated between not allowing same-sex marriages (pre-*Marriage Cases*), allowing same-sex marriages (post-*Marriage Cases* but pre-Proposition 8), not allowing same-sex marriages (post-Proposition 8 but pre-injunction), and then back to allowing them (post-injunction). If Proposition 8 were later upheld, as is likely, yet another change would occur, back to the traditional limitation of marriage to opposite-sex couples. Such instability in the definition of marriage is deeply unsettling and harmful to the general public and to the institution of marriage.

Further, if this Court grants a preliminary injunction or stay allowing same-sex couples to marry while the status of Proposition 8 is litigated, it

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[1] The public interest is relevant to this analysis for two reasons. First, when engaging in this balancing analysis, the Court must consider the "adverse effect on the public interest or interests of third parties the granting of the injunction will cause." (*Vo v. City of Garden Grove*, *supra*, 115 Cal.App.4th at 435 [quoting *Cohen v. Board of Supervisors*, *supra*, 40 Cal.3d at 286 n.5].) Second, "[g]overnment officials are expected as a part of the democratic process to represent . . . their constituents." (*Keller v. State Bar of California* (1990) 496 U.S. 1, 12.) Because Respondents' harms are at issue, (*see IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at 69-70,) and part of their interests encompasses the people they represent, this Court must consider the harm to the people of California.

will create a class of "interim" same-sex marriages whose validity would be highly questionable if Proposition 8 were later upheld, effective November 5, 2008. More costly litigation would surely follow.

Lastly, enjoining Proposition 8 during the pendency of this litigation or otherwise granting interim relief would harm the people of California by undermining the preeminence of the Constitution. "[T]he provisions of the California Constitution itself constitute the ultimate expression of the people's will." (*In re Marriage Cases*, *supra*, 43 Cal.4th at 852.) Use of the initiative power to amend the Constitution is particularly important to the people, "it being one of the most precious rights of [California's] democratic process." (*Amador Valley*, *supra*, 22 Cal.3d at 248.) Californians expressed their will regarding marriage when they approved Proposition 8 by a majority vote. Enjoining or staying the enforcement of Proposition 8 – as if it were a mere statute or municipal ordinance to be set aside by the judiciary pending further proceedings, rather than a presumptively valid expression of the people's sovereign will – would be widely perceived as the judiciary ignoring or countermanding the supremacy of the Constitution and silencing the voice of the people on a vitally important matter of public policy. That would be deeply harmful to the democratic process.

In sum, the balance of the interim harms weighs in favor of denying Petitioners' request for interim relief.

3. Denying Interim Relief Best Minimizes The Harm That An Erroneous Interim Decision May Cause.

The "principal objective of a preliminary injunction 'is to minimize the harm which an *erroneous* interim decision may cause.'" (*White v. Davis*, *supra*, 30 Cal.4th at 561 [emphasis in original] [quoting *IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at 73].) Here, an erroneous decision

to deny a preliminary injunction or interim stay would risk minimal harm, principally due to temporarily delayed marriages. Suppose this Court denied a preliminary injunction or stay on the initial view that Proposition 8 is most likely an amendment. Suppose further that after full briefing on the merits and additional reflection, this Court later holds that Proposition 8 is an improper revision. Under those circumstances, some same-sex couples might have suffered a delay of a few months but would still be able to marry. As noted, none of the individual Petitioners has a concrete plan to marry by a particular date, so the actual harm of denying interim relief is unknowable.

In contrast, an erroneous decision to grant a preliminary injunction despite the validity of Proposition 8 would cause significant harm: public confusion, instability in the law governing a fundamental social institution, public disillusionment with the judiciary and its perceived disregard for the will of the people, and delaying the operation of a valid constitutional amendment – one intended to take effect immediately – on an important issue of public policy. As explained, it would also create a group of "interim" same-sex marriages subject to great legal uncertainty and likely invalidation.

Given these alternative scenarios, denying a preliminary injunction or similar relief is the best means to "minimize the harm which an *erroneous* interim decision may cause." (*See White v. Davis*, *supra*, 30 Cal.4th at 561 [emphasis in original; citation and internal quotation marks omitted].) This Court should deny Petitioners' request for interim relief.

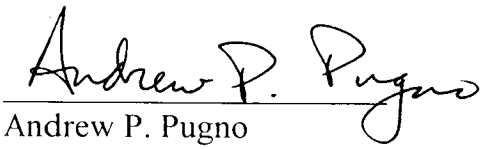
CONCLUSION

To secure the legitimate interests of all concerned, this Court should exercise its jurisdiction in this matter, deny Petitioners' request for interim relief, and set an expedited schedule for full briefing and argument so that a decision denying the Amended Petition on the merits can be rendered as soon as possible.

Dated: November 17, 2008

Respectfully submitted,

LAW OFFICES OF ANDREW P. PUGNO
ANDREW P. PUGNO



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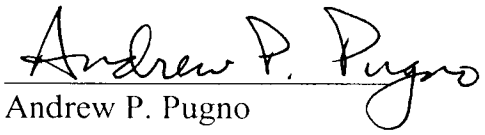
RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Proposed Intervenors hereby certifies that this Preliminary Opposition to Petition for Extraordinary Relief is proportionately spaced, has a typeface of 13 points or more, and contains 5,320 words, including footnotes but excluding the Table of Contents, Table of Authorities, and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.



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